APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR CERTIFICATE OF APPEALABILITY FILED DECEMBER 6, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1717

MATTHEW S. ENGLISH,

Petitioner-Appellant,

v.

SHERRY BURT, Warden,

Respondent-Appellee.

ORDER

Matthew S. English, a Michigan state prisoner, moves through counsel for a certificate of appealability and appeals a district court judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon consideration, the motion for certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING PETITIONER'S MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY FILED JUNE 30, 2004

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-CV-73385-DT

MATTHEW S. ENGLISH,

Plaintiff,

v.

SHERRY BURT,

Defendant.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Pending before the court is Petitioner Matthew English's "Motion and Brief for Issuance of Certificate of Appealability," filed on June 2, 2004. The court dismissed English's petition for a writ of habeas corpus on May 17, 2004, and now denies his instant request for a certificate of appealability.

Appendix B

Before a habeas corpus petitioner may appeal a federal court's dispositive decision dismissing his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a prisoner's habeas corpus petition is denied on procedural grounds, a certificate of appealability "should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In its May 17 order, the court held that habeas relief was precluded because Petitioner had not presented his claim to the state courts in accordance with state procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). The court found that

the last state court rendering a decision in Petitioner's case held that his claim was barred because it had been procedurally defaulted, and thus federal habeas review was unavailable. Although the Michigan Supreme Court decision denying him leave to appeal was brief—simply relying on Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal—the record indicated that Petitioner failed to raise his ineffective assistance of counsel claim on direct appeal and thus was procedurally defaulted under state law. Thus, the court found that the state court's decision was based on an independent and adequate state procedural rule, and that Petitioner was precluded from seeking habeas relief. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000).

Reasonable jurists could not debate that Petitioner failed to comply with the state's procedural rules or that the last reasoned state court judgment—the trial court's denial of Petitioner's motion for relief from judgment—relied on this procedural default in dismissing his ineffective assistance of counsel claim. *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner did not raise his ineffective assistance of counsel claim on direct appeal and the trial court found that Petitioner had not shown good cause or actual prejudice for the default. The trial court's ruling was based upon state procedural rules and thus the court correctly held that the habeas petition was procedurally barred.

Further, reasonable jurists could not disagree with the court's conclusion that Petitioner has not shown cause or prejudice to excuse his procedural error. Petitioner has failed to persuasively explain why he did not raise the ineffective

assistance of counsel on direct appeal. He has also not demonstrated that his substantive claim has merit.

Finally, reasonable jurists could not disagree with the court's ruling that Petitioner failed to establish that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception to procedural errors requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent (i.e., factually innocent rather than legally insufficient). *See Schlup v. Delo*, 513 U.S. 298, 326-27 (1995); *see also Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner pleaded *nolo contendre* to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. Petitioner has presented only bare allegations that an investigation would have proved that he was not the driver of the car that hit and killed the victim; he presents no evidence that he is actually innocent. Accordingly, the court is not convinced that a miscarriage of justice occurred in this case.

For the reasons set forth above, a certificate of appealability will not issue.

s/ Robert H. Cleland
Robert M. Cleland
UNITED STATES DISTRICT JUDGE

June 30, 2004

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND DISMISSAL OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS DATED MAY 17, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-CV-73385-DT

MATTHEW S. ENGLISH,

Petitioner,

v.

SHERRY BURT,

Respondent.

OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Matthew S. English, a state prisoner currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is incarcerated in violation of his constitutional rights. The

matter is before the court on Respondent's motion for summary judgment seeking dismissal of the petition on the basis of procedural default. For the reasons set forth below, Respondent's motion will be granted and the petition for writ of habeas corpus will be dismissed.

I. FACTS

On December 27, 2000, Petitioner pleaded *nolo contendere* to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if Petitioner was physically able, and other conditions. The prosecution subsequently filed a motion to correct sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001, the trial court re-sentenced Petitioner to five years of probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp", and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal as of right from his plea-based conviction. *See People v. English*, Case No. 235040 (Mich. Ct. App. July 19, 2001).

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On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted which could have exonerated him of the most serious charges. The trial court denied the motion finding that Petitioner had failed "to establish `good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds presented." *People v. English*, Case No. 243738 (Mich. Ct. App. Oct. 10, 2002). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, 659 N.W.2d 234 (2003).

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to produce an independent accident reconstruction expert. On March 10, 2004, Respondent filed the instant motion for summary judgment seeking dismissal

of the habeas petition on the basis of procedural default. On March 30, 2004, Petitioner filed an answer and brief in response to the motion.

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. 2241 *et seq.*, sets forth the standard of review that federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, __ U.S. _, 123 S. Ct. 2527, 2534 (2003). The AEDPA applies to all habeas petitions filed after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Because Petitioner instituted this action after the AEDPA's effective date, his case is governed by the AEDPA. As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Petitioner claims that he is entitled to habeas relief because trial counsel was ineffective for failing to conduct accident reconstruction evaluation, which he claims would have exonerated him of the most serious charges against him. Respondent contends that this claim is barred by procedural default.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). A petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment In the case rested its judgment on the procedural default. *Wainwright*, 433 U.S. at 85; *Coleman v. Mitchell*, 244 F.3d 533, 539 (6th Cir. 2001). In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. *Yist v. Nunnemaker*, 501 U.S. 797, 803-05

(1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Supreme Court relied upon Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal. That rule provides, in part, that a court may not grant relief to a defendant if the motion for relief from judgment alleges grounds for relief which could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting therefrom. *See* Mich. Ct. R. 6.508(D). The state court's decision, while brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Although the Michigan Supreme Court did not fully explain its decision, the record indicates that Petitioner failed to raise this issue on direct appeal of his convictions despite the opportunity to do so.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996).

In this case, Petitioner neither alleges nor establishes cause to excuse his procedural default in failing to raise the ineffective assistance of trial counsel claim before the state courts on direct appeal of his convictions. A federal habeas court need not address the issue of prejudice when a petitioner

fails to establish cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983).

Further, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner has made no such showing. At the August 25, 2000 preliminary examination, Petitioner's friend testified that Petitioner was using inhalants shortly before the accident, an eyewitness to the accident testified that she observed Petitioner's vehicle cross the center line and strike the other car, and police investigators trained in accident reconstruction opined that the physical evidence was consistent with the eyewitness testimony. The fact that defense experts may have offered testimony to counter the prosecution's evidence as to the circumstances of the accident does not establish Petitioner's actual innocence. Petitioner's claim is thus barred by procedural default and does not warrant habeas relief.

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III. CONCLUSION

IT IS ORDERED that Respondent's motion for summary judgment [Dkt. # 4] is GRANTED.

Dated: May 17, 2004

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR LEAVE TO APPEAL ENTERED MARCH 31, 2003 AND FILED APRIL 14, 2004

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

Entered: March 31, 2003

SC: 122547
COA: 243738
St. Clair CC: 00-002518-FH

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

MATTHEW S. ENGLISH,

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the October 10, 2002 decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

March 31, 2003

s/ Corbin R. Davis
Clerk

APPENDIX E — ORDER OF THE MICHIGAN COURT OF APPEALS DENYING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL DATED OCTOBER 10, 2002 AND FILED APRIL 14, 2004

COURT OF APPEALS, STATE OF MICHIGAN

Donald S. Owens
Presiding Judge

Donald E. Holbrook, Jr.

Patrick M. Meter
Judges

People of MI v. Matthew S. English

Docket No. 243738

LC No. 00-002518-FH

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

s/ Donald Owens
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on OCT 10, 2002

s/ Sandra Schultz Mengel
Chief Clerk

APPENDIX F— ORDER OF THE ST. CLAIR COUNTY CIRCUIT COURT DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT DATED AUGUST 22, 2002

STATE OF MICHIGAN
IN THE 31ST CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

Case No. 00-2518-FH
HON. JAMES P. ADAIR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

MATTHEW SCOTT ENGLISH,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, continued and held in the County Building, in the City of Port Huron, on this 22 day of August, 2002.

On December 27, 2000, Defendant pled nolo contendere to two counts of Homicide Manslaughter – Motor Vehicle contrary to MCL 750.321-E and to one count of Driving Felonious, contrary to MCL 752.19. The Court granted the prosecutor's motion to correct the February 20, 2001 sentence

and on May 29, 2001, the Court re-sentenced Defendant to five years probation on terms and conditions including the first year in custody.

Defendant pled guilty to violating the terms and conditions of his probation on July 25, 2001. On August 7, 2001, this Court discharged Defendant from probation as a violator without improvement and sentenced him to a prison term of 72 to 180 months, with credit for 169 days previously served.

Defendant now brings this motion for relief from judgment pursuant to MCR 6.502 et. seq. The Court has reviewed Defendant's motion and supporting materials, as well as the file, records, transcripts and correspondence relating to the conviction. In particular, this Court has considered the Preliminary Examination testimony of Casey Tucker, Gail Stevens, and William Trout. Ms. Stevens was an eyewitness to the accident and testified that Defendant's vehicle crossed the center line causing the accident. Sergeant Trout has been trained in accident reconstruction and testified that his evaluation and observation of the physical evidence was consistent with Ms. Stevens testimony. Sergeant Beach of the Michigan State Police also completed an accident reconstruction.

The Court notes that the attorney representing a defendant in a criminal case is given substantial latitude in making strategic and tactical choices respecting that representation.

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Based upon the eyewitness testimony at the preliminary examination and the police testimony that the eyewitness version was consistent with the physical evidence and accident reconstruction, the Court finds Defendant's claim is without merit.

A review of the Plea transcript dated December 27, 2000 reveals that the Court advised the Defendant and the Defendant acknowledged that the plea would be accepted if it was conditioned upon a specific sentence and that no one could promise the Defendant what his sentence would be. Defendant also acknowledged that the plea was voluntary.

The Court finds that Defendant has failed in his burden to establish "good cause" and "actual prejudice" from the alleged irregularities in support of his claim for relief. For these reasons, it plainly appears to the Court upon review of the materials that Defendant is not entitled to the relief requested. Therefore, Defendant's Motion for Relief from Judgment is DENIED.

SO ORDERED.

Dated: August 22, 2002 s/ James P. Adair
JAMES P. ADAIR, Circuit Judge

APPENDIX G— ORDER OF THE MICHIGAN COURT OF APPEALS DISMISSING CLAIM OF APPEAL DATED JULY 19, 2001 AND FILED APRIL 14, 2004

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: People of MI v Matthew Scott English
Docket No. 235040
L.C. No. 00-002518-FH

Richard A. Bandstra, Chief Judge, acting under MCR 7.203(F)(1) and 7.216(A)(10), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the judgment of sentence, which was based on a plea to a crime committed after December 27, 1994, is not appealable as a matter of right. MCR 7.203(A)(1)(b). See also 1994 PA 375, MCL 600.308(2)(d); MSA 27A.308(2)(d). As a result, the order in question is appealable to this Court only if leave is granted under MCR 7.205. See MCR 7.203(B)(1).

JUL 19, 2001
Date

s/ Sandra Schultz Mengel
Chief Clerk

APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment of the U.S. Constitution

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for the defense.

Michigan Court Rule 6.508(D):

> **Entitlement to Relief:** The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in the prior motion under this subchapter, unless the defendant demonstrates

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(a) good cause for failure to raise such grounds on appeal or in the prior motion and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

. . . .

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.